SUPREME COURT, U. S

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-665

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
VOLKSWAGEN OF AMERICA, INC.,

and

IMPORT MOTORS OF CHICAGO, INC.,

Petitioners,

v.

PAUL D. PRASHAR,

and

DARLENE PRASHAR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	4
A. The Parties	4
B. Circumstances Surrounding Commencement of the Action	4
C. Proceedings in the District Court on the Statute of Limitations Defense	5
D. The Determination of the Court of Appeals	6
Reasons for Granting the Writ	6
A. *Ragan* and *Hanna* Are Not in Conflict on the Facts of this Case; Both Mandate a Reversal of the Court of Appeals	7
B. Blind Adherence by the Court of Appeals to Artificial or Rigid Tests of "Integral-Relations," "Integral Part" or "Intrinsically-Related" State Substantive Rules Was Improper and Requires Reversal	12
C. The Split in Authorities Dealing with these Issues Justifies Review by this Court	18
Conclusion	18
Appendix:	
Opinion of United States Court of Appeals for the Eighth Circuit	1a

Table of Cases Cited

PAGE

Arbach v. Gruba, 199 N.W. 2d 697 (S.D. 1972) 13

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 2, 7, 8, 11, 12, 17

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 11, 12

Hanna v. Plumer, 380 U.S. 460 (1965) 6, 7, 10, 11, 12, 15, 16, 17

Lumbermen's Mutual Casualty Co. v. Wright, 322 F. 2d 759 (5th Cir. 1963) 12

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) 2, 6, 7, 9, 10, 11, 12, 15, 16, 17

Taylor v. McCarty, 4 N.W. 2d 816 (S.D. 1942) 13

Table of Statutes Cited

SOUTH DAKOTA COMPILED LAWS:

Section 15-2-14 ..... 2, 9, 13, 14

Section 15-6-3 2

Section 15-2-30 ..... 2, 9, 12

Section 15-2-31 ..... 3, 9, 12, 13

Section 15-7-1 ..... 3, 5

Section 15-7-2 3

Section 15-7-3 ..... 3, 9

FEDERAL:

28 U.S.C., section 2072 ..... 3, 4, 6, 8, 11

Federal Rules of Civil Procedure, Rule 3 ..... 4, 9, 10

Other Authorities Cited

PAGE

2 Moore, Federal Practice § 3.07 [4-3-1] at 779 (2d ed. 1970) 14, 15

Note, *The Tolling of State Statutes of Limitations in Federal Courts,* 71 Colum. L. Rev. 865 (1971) 18

Note, *A Chance for the Ragan Court to Redeem Itself: Chappell* v. *Rouch,* 26 S.W.L.J. 429 (1972) .. 18

Note, *State Statutes of Limitations in Federal Courts,* 1971 Duke L. J. 785 18

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Opinion Below

The opinion of the United States Court of Appeals is reproduced as an appendix to this Petition (pp. la *et seq.*). The opinion is reported as *Prashar* v. *Volkswagen of America, Inc.*, 480 F. 2d 947 (8th Cir. 1973).

Jurisdiction

The opinion of the Court of Appeals was filed on June 27, 1973. Petitioners' application for rehearing was denied on July 19, 1973. Jurisdiction of this Court is invoked under 28 U.S.C., Sect. 1254(1).

Questions Presented

1. Were respondents' causes of action against petitioners barred by the applicable South Dakota statute of limitations?

2. Is the decision of the Court of Appeals for the Eighth Circuit inconsistent with this Court's decisions in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and other holdings requiring a state's substantive law, including its statutes of limitations, to be applied in an action in the United States District Court based on diversity of citizenship?

The Eighth Circuit answered both questions in the negative. Petitioners submit that the proper answer to both questions is "Yes."

Statutes Involved

South Dakota Compiled Laws:

15-2-14. Except where, in special cases, a different limitation is prescribed by statute, the following civil actions * * * can be commenced only within three years after the cause of action shall have accrued:

* * *

(3) An action for personal injury.

* * *

15-6-3. Commencement of Action

A civil action is commenced as provided in §§ 15-2-30 and 15-2-31.

* * *

15-2-30. Commencement of action by service of summons * * *. An action is commenced as to each defendant when the summons is served on him * * *.

15-2-31. Attempted commencement of action by delivery of summons to sheriff-Publication or service following attempt. — An attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them, usually or last resided: or if a corporation be defendant, to the sheriff or other officer of the country in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. Such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

* * *

15-7-1. As used in Sections 15-7-1 to 15-7-5, inclusive, the word, "person," * * * whether or not organized under the laws of this state includes * * * a corporation* * *.

15-7-2. Any person is subject to the jurisdiction of the courts of this state as to any cause of action arising from the doing personally, through any employee, or through an agent, of any of the following acts:

* * *

(2) The commission of any act which results in accrual within this state of a tort action * * *.

15-7-3. Service of process upon the persons subject to Section 15-7-2 may be made by service outside this state in the same manner provided for service within this state with the same force and effect as though service had been made within this state.

28 U.S.C., section 2072.

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions * * *.

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

* * *

Federal Rules of Civil Procedure, Rule 3.

"Commencement of Action.

A civil action is commenced by filing a complaint with the court."

Statement

A. The Parties

Petitioners are Volkswagenwerk Aktiengesellschaft ("VWAG") Volkswagen of America, Inc. ("VWoA"), and Import Motors of Chicago, Inc. ("Import"), respectively the manufacturer, the United States importer, and a wholesale distributor of Volkswagen vehicles. VWAG is a corporation organized and doing business in the Federal Republic of Germany. VWoA is a New Jersey corporation and Import is an Illinois corporation.

Respondents Paul D. Prashar and Darlene Prashar, husband and wife, are plaintiffs in this products liability suit commenced in the United States District Court for the District of South Dakota, Southern Division. Mr. Prashar was the driver and sole occupant of a Volkswagen vehicle involved in a single car accident which occurred in South Dakota on October 5, 1968, allegedly as a result of defects in the vehicle. Mrs. Prashar sues derivatively.

B. Circumstances Surrounding Commencement of the Action

On October 4, 1971 respondents filed their complaint against VWAG, VWoA and a Volkswagen wholesale distributor, Import, in the office of the Clerk of the United States District Court based on the October 5, 1968 accident.

On October 15, 1971 a motion for an order for personal service upon all the defendants outside South Dakota was filed. An order was entered on October 16, 1971 directing such service.

On October 19, 1971 the United States Marshal for the District of South Dakota received copies of the summons and complaint to be served on the three defendants.

A copy of the summons and complaint was delivered to VWoA by the sheriff in New Jersey. An attempt to deliver copies to Import was made by the United States Marshal in Chicago on October 23, 1971, but the officer delivered the copies to the wrong person and this attempted service was quashed, with leave to attempt service again. Import eventually received copies on April 28, 1972. VWAG received copies of the summons and complaint by registered mail in Wolfsburg, Germany on or about October 26, 1971.

Respondents claimed *in personam* jurisdiction over petitioners under the South Dakota "long arm" statute, South Dakota Compiled Laws ("SDCL"), sections 15-7-1 *et seq.*

C. Proceedings in the District Court on the Statute of Limitations Defense

VWoA moved for summary judgment on the ground that the South Dakota three year statute of limitations barred the action. This motion was granted on September 22, 1972 and an order was filed on September 26, 1972.

Import's motion for summary judgment was granted on September 28, 1972.

VWAG's motion for similar relief was denied on October 13, 1972. The court, however, indicated that a substantial difference of opinion existed on the question of law involved, and that an immediate appeal may materially advance termination of the litigation. On November 6, 1972 the Court of Appeals for the Eighth Circuit granted VWAG's petition for leave to appeal to that court.

Respondents, in turn, filed a notice of appeal from the orders granting VWoA and Import summary judgment. The question of the applicability of the South Dakota statute of limitations to the claims against all the defendants was thus placed before the court.

D. The Determination of the Court of Appeals

The court of appeals reversed the judgments in favor of VWoA and Import and affirmed the denial of summary judgment to VWAG, holding that none of the causes of action by respondents against any defendant was barred by the South Dakota statute of limitations. Petitioners' application for reargument *en banc* was denied.

The "judicial gymnastics" effected by the court of appeals in an attempt to come within the mandates of this Court and the Rules Enabling Act [28 U.S.C., section 2072], providing that the Federal Rules of Civil Procedure shall not "abridge, enlarge or modify any substantive right," makes it difficult to state clearly the precise holding of the court. Essentially, however, the court stated that, because the South Dakota statute requiring an action to be commenced by service of a summons was not drafted as part of the same paragraph requiring actions to be commenced within three years, the service provision was not "so intrinsically related" to the limitations provision, and that the mere filing of the complaint was, under Rule 3 of the Federal Rules of Civil Procedure, sufficient to toll South Dakota's statute of limitations. This result, it said, was "pursuant to the dictates of *Hanna* v. *Plumer*," 380 U.S. 460 (1965), despite the fact that *Hanna* "did not overrule" this Court's prior *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

Reasons for Granting the Writ

The decision of the Court of Appeals for the Eighth Circuit in the case at bar is the culmination of a series of

conflicting court of appeals decisions interpreting this Court's opinions in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), and *Hanna* v. *Plumer*, 380 U.S. 460) (1965), which have attempted to balance the countervailing considerations behind uniformity of Federal procedural rules on the one hand and the requisites of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and similar decisions on the other. The present decision represents perhaps a praiseworthy effort to reconcile all the decisions which have preceded it. The result, however, is stretched and strained law and tortured "harmonization" which runs afoul of constitutional provisions. Only an authoritative decision by this Court will stem the flood of confusion that already exists and that can only be increased if the opinion of the Eighth Circuit is permitted to remain unreversed.

Under the facts of this case, petitioners submit that there is no real conflict between this Court's decisions in *Ragan* and *Hanna;* that both decisions mandate a result contrary to that reached by the Court of Appeals; and that the legal tests utilized by the Eighth Circuit result from a misinterpretation of this Court's decisions, caused, for the most part, by the unresolved conflicts among decisions in other circuits in this area.

A. *Ragan* and *Hanna* Are Not in Conflict on the Facts of this Case; Both Mandate a Reversal of the Court of Appeals.

In *Ragan,* this Court held that a United States district court was obligated to apply the state's statutory provision on "commencement" of an action in order to determine whether the suit was timely commenced within the state's applicable statute of limitations. This Court stated that because the "cause of action is created by local law, the measure of it is to be found only in local law." 337 U.S. at 533. The action "carries the same burden and is subject to the same defenses in the federal court as in the

state court." *Ibid.* Thus, where local law qualifies or abridges the cause of action, "the federal court must follow suit." Otherwise, there would be "a different measure of the cause of action in one court than in the other" and there would be transgression of the principle of *Erie R. Co.* v. *Tompkins*. *Ibid.*

Petitioners are foreign corporations, a manufacturer, importer and wholesale distributor of automobiles. Pursuant to "long arm" statutes they find themselves subject to personal jurisdiction in states in which they do no business, maintain no office, sell no products and do no other acts which can provide a traditional nexus for jurisdiction. In this case, for example, petitioners are sought to be held subject to *in personam* jurisdiction in South Dakota because a South Dakota "long arm" statute prescribes that "commission of any act which results in accrual within this state of a tort action" is a sufficient basis for jurisdiction as to that cause of action. Assuming for present purposes that this statute is constitutionally valid, ultimate liability would be determined under a South Dakota standard of care and the South Dakota substantive law of products liability would govern.

Yet, by virtue of the court of appeals decision, petitioners would be denied the very rights and defenses to which a defendant in the South Dakota courts would be entitled. Committed as the Federal courts are to apply state substantive law in diversity of citizenship cases, petitioners would still be denied application of the state's substantive law. Explicit as is the statutory admonition that the Federal Rules "shall not abridge, enlarge or modify any substantive right" [28 U.S.C. § 2072], petitioners would still find themselves obligated to defend an action which is plainly barred under South Dakota law and respondents would have been granted substantive rights against petitioners which South Dakota law denies to them.

Petitioners submit that, at the very least they are entitled to the benefits of the application of South Dakota's substantive statute of limitations. When all is said and done, this holding of *Ragan* remains as the law today.

In *Ragan*, like the instant case, the question was whether an action was properly "commenced" in order to toll the statute of limitations. There, as here, the complaint was filed in the United States district court within the statutory period, but service of the summons, the decisive tolling act under Kansas law, was untimely. This Court held that the action was barred despite the fact that under Rule 3 of the Federal Rules of Civil Procedure, the filing of the complaint commences the action.

The South Dakota limitations statute applicable in this case provides that an action can be "commenced" only within three years after the cause of action shall have accrued. SDCL § 15-2-14(3). South Dakota law also provides that an action is "commenced" against a defendant "when the summons is served on him." SDCL § 15-2-30. In addition, an "attempt to commence an action" is deemed equivalent to commencement "when the summons is delivered, with the intent that it shall actually be served, to the sheriff or other officer . . .", if the attempt is followed by service (or publication of the summons) within sixty days. SDCL § 15-2-31. And service of process pursuant to the "long arm" statute may be made by service outside South Dakota "in the same manner provided for service within this state" with the same force and effect. SDCL § 15-7-3.

The acts of respondents in this case were clearly insufficient, under South Dakota law, to commence an action for purposes of tolling the statute of limitations. The only basis on which respondents have deprived petitioners of their substantive rights under this statute is the fact that they filed their complaint within the statutory period. The

deprivation of petitioners' substantive rights is directly derived from the procedural provision of Rule 3 of the Federal Rules of Civil Procedure.

There can be no question that the circumstances surrounding untimely "commencement" of the action in this case parallel those presented in the *Ragan* case. Both cases involve the relationship of Rule 3 to the state law on "commencement" for statute of limitations purposes in diversity of citizenship actions.

Nevertheless, the court of appeals, concluded that, "pursuant to the dictates" of *Hanna* v. *Plumer,* Rule 3 "must control the manner of tolling the statute of limitations." (p. 13a).

We respectfully submit that these dictates are nonexistent. *Hanna* involved a situation totally different from *Ragan* and left unblemished applicability of the *Ragan* holding to cases such as the one at bar. *Hanna* dealt with a completely different issue in a different setting.

To begin with, *Hanna* did *not* involve any question of "commencement" of an action for purposes of any statute of limitations. This Court made that fact clear in *Hanna* when it stated that the limitations period "is not involved in this case, since the action clearly was timely commenced." 380 U.S. at 462 n.1. Likewise, in distinguishing *Hanna* from the *Ragan* case, this Court noted that *Hanna* did *not* present "a situation where application of the state rule would wholly bar recovery." 380 U.S. at 469.

The only matter at issue in *Hanna* was whether state or Federal law would control purely procedural aspects of service of process. *Hanna* was concerned solely with the *manner* of serving process in a federal diversity suit. Service of process pursuant to Federal Rule 4(d)(1) was held in *Hanna* to control despite the fact that state law required a different *manner* of service. Thus, "adherence

to the state rule would have resulted only in altering the way in which process was served." 380 U.S. at 469.

The use of labels, such as "substantive" or "procedural," or catch phrases, such as "outcome-determination," cannot, in the final analysis, resolve issues such as the one at bar. See 380 U.S. at 465-66, 466-67, 473. Only the common-sense approach mandated by this Court's decisions in *Erie, Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945), *Ragan* and *Hanna* can achieve the desired result, codified in the Rules Enabling Act [28 U.S.C. § 2072], that the Federal Rules "shall not abridge, enlarge or modify any substantive right ***." *Hanna* itself suggests that a state substantive rule going beyond the *manner* of service which would "wholly bar recovery" is entitled to application in a federal diversity suit. 380 U.S. at 469. Thus, the "dictates" of *Hanna* are clearly contrary to those divined by the court below.

Petitioners submit that the only true test to be applied in this case is whether South Dakota's substantive rule would "wholly bar recovery" were petitioners defendants in a South Dakota court. The answer to this question is undeniably "Yes." A contrary result is not permissible merely because the suit has been filed in a Federal forum.

If this Court's governing decisions are to be ignored by an inferior Federal court, it remains for this Court either to rectify the result or to adopt the decision below by enunciating a different rule upon which parties in lawsuits may clearly rely. In either case, this petition for a writ of certiorari provides the vehicle for requisite action by this Court. This is all the more true since resolution of the issues in this case involve constitutional considerations. *Erie R. Co.* v. *Tompkins, supra; Ragan* v. *Merchants Transfer & Warehouse Co., supra; Hanna* v. *Plumer, supra.*

B. Blind Adherence by the Court of Appeals to Artificial or Rigid Tests of "Integral-Relations," "Integral Part" or "Intrinsically-Related" State Substantive Rules Was Improper and Requires Reversal.

In *Hanna* this Court made clear its dislike of labels or rigid tests in determining whether state law or Federal Rule controls in a federal diversity action. Such tests lead to conflicting and unintended results. Thus, quoting from a Fifth Circuit decision,* this Court observed that the purpose of the *Erie* doctrine, even as extended in *York* and *Ragan,* was never intended "to bottle up" Federal courts with " 'outcome-determinative' and 'integral-relations' stoppers" 380 U.S. at 473.

Yet the Eighth Circuit decision does this, precisely and explicitly. Indeed the Eighth Circuit, quoting from *Hanna,* went so far as to acknowledge that "perhaps our approach runs counter to the 'integral-relations' stoppers concern of the Fifth Circuit. (p. 12a, n. 14).

The objectionable "stopper" by the Eighth Circuit was the conclusion that, since South Dakota's provision on "commencement" of an action was not "an integral part" of South Dakota's statute of limitations, the state's "commencement" provision was not to be applied. The court found the South Dakota provision "not to be so intrinsically related to the rights flowing from the statute of limitations" as to make the state rule controlling (p. 13a).

This strained effort at statutory interpretation cannot withstand scrutiny. The similarity of the South Dakota "commencement" statutes to the Kansas statutes involved in *Ragan* is manifest when the respective provisions are laid side by side. A comparison of the Kansas statute cited in *Ragan,* 337 U.S. at 531 n.4 with the South Dakota provisions, SDCL §§ 15-2-30 and 15-2-31, *supra* pp. 2-3, shows

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* *Lumbermen's Mutual Casualty Co.* v. *Wright,* 322 F.2d 759, 764 (5th Cir. 1963)

that although the South Dakota provisions do not contain all the precise words of the Kansas Statute, the "commencement" provision is indisputably intertwined with the limitations provisions and "appears as part of a chapter of our Code dealing with the limitations of actions." *Taylor* v. *McCarty*, 4 N.W.2d 816, 817 (S.D. 1942).

The South Dakota Supreme Court has recently reaffirmed the "intrinsic" linking of the "commencement" provision with the state's statute of limitations in *Arbach* v. *Gruba*, 199 N.W.2d 697 (S.D. 1972), where the "commencement" provision of SDCL § 15-2-31 was involved:

> "It is clear that it means just what it says, and therefore, that in order to prevent the running of the Statute of Limitations after the delivery of this Summons, such Summons must have been served within 60 days after it was received by the sheriff. * * * The Trial Court correctly held that this cause of action had been barred by the [applicable Statute of Limitations]."

There is no question that the "commencement" provisions enacted by South Dakota are "general" in the sense that they determine the commencement of actions for various purposes, *in addition to* providing a basis for determining if the statute of limitations has been tolled. *Taylor* v. *McCarty, supra*, 4 N.W.2d at 817-818 (S.D. 1942). But of what significance is this fact when it must be acknowledged that the "commencement" provisions relate "directly," "intrinsically" and "indisputably" to South Dakota's statute of limitations?

The applicable South Dakota limitations statute, SDCL § 15-2-14, expressly mentions "commencement" of an action, *i.e.*

> "Except where, in special cases, a different limitation is prescribed by statute, the following civil

> actions * * * can be *commenced* only within three years after the cause of action shall have accrued:
>
> * * *
>
> (3) An action for personal injury." (Emphasis supplied).

The "intrinsic relationship" or "commencement" for limitations purposes to the so-called "general" commencement provision is obvious. The stylistic preference in draftsmanship of a particular legislature should not be the basis for circumvention of established law when it is unquestioned that the legislative provisions on limitations and "commencement" are vitally linked both statutorily and in practice. Stylistically sound draftsmanship, involving economy of words and streamlining of provisions, should not be the basis for depriving defendants of substantive rights.

The arbitrary categorization of the "commencement" statute as "general" and therefore "not an integral part" or not "intrinsically related" to the South Dakota statute of limitations is simply an erroneous undertaking. If the state's limitation period is to be applied, which provision governs "commencement" of the action? Undeniably, it is the so-called "general" statute. That is what the South Dakota legislature intended and that is what the South Dakota courts apply.

That the tortured reasoning of the Eighth Circuit evinced substantial doubts as to the approach taken by the court is reflected in the opinion, although relegated to a footnote reference. Thus, the Eighth Circuit stated:

> "Of course, the troublesome question is what difference does it make whether a state reads two rules together to reach a given result or legislates one rule which embodies the two to reach the same result. We recognize merit to Professor Moore's criticism of the approach taken here. See 2 Moore,

Federal Practice § 3.07 [4-3-1] at 779 (2d ed. 1970) (p. 12a, n. 14).*

Further doubt is expressed by the court in its acknowledgment that "perhaps" its approach "runs counter to the 'integral-relations' stoppers concern" (p. 12a, n. 14). Nevertheless, despite these doubts, the court expresses the result-orientation of its conclusion, for without its artificial distinction between "general" and "integrally-related" commencement statutes, the approach "would require us to say that *Hanna* overruled *Ragan,* which, as we have said, we refuse to do." *Ibid.*

In other words, what the Eighth Circuit is saying is that it had to reason the way it did to reach the result it did because it cannot say that *Hanna* overruled *Ragan.* Hence, it must employ tortured and illogical reasoning to sustain the result. The practical effect, of course, despite the judical "sleight of hand," is to nullify *Ragan.*

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* The referenced "criticism" of Professor Moore is as follows:

"First, the Supreme Court in the *Ragan* case did not specifically rest its decision on the holding of the Court of Appeals that the Kansas 'commencement' statute was an integral part of the Kansas statute of limitations. The broader rationale of the case is that there should be no substantial difference in result where the action is brought in the federal rather than the state court and 'on the theory that, where he is barred from recovery in the state court, he should likewise be barred in the federal court.' This being the basis of the decision it would not seem to make any difference whether the 'commencement' provisions were an integral part of the statute of limitations or not; or whether the commencement provisions were contained in some other statutory provision or in judicial decisions. The federal court should look to the state law. If under the existing fact situation the action would be barred there, then it is barred in the federal court, regardless of whether the action would be barred in the state court because the summons was not issued in time, not served in time, or because under state law due diligence was not used in serving the summons."

The court below generalizes the question even further by establishing the following test:

> "[W]e feel a determination must be made in every case as to whether the state has taken a rule of practice and substantially intertwined that rule with the basic right of recovery. When this is so, the rule cannot be viewed as affecting only the mode of relief, and the 'countervailing considerations' of a desired uniform practice in a federal court must yield to 'the policy of uniform enforcement of state-created rights and obligations' " (pp. 12a-13a, n. 14).

The result reached by the Eighth Circuit does not even pass muster under the pronounced test. This Court held in *Ragan* that a state's statute of limitations controlled in a diversity action and reaffirmed in *Hanna* that such a result was mandated because the application of the state rule "would wholly bar recovery." *Hanna* v. *Plumer, supra,* 380 U.S. at 469. Thus, the South Dakota rule must be applied. How possibly could the court of appeals justifiably conclude that the state's "commencement" provision was not "substantially intertwined" with the state's statute of limitations when the very essence of computing the statute hinges on commencement of the action?

When all is said and done, the rights of the claimant canot be enlarged by *ex parte* procedures in the Federal court, *i.e.,* the simple filing of a complaint. Any holding to the contrary would, we submit, be unconstitutional.

The substantive rights of the plaintiffs in this case and the concomitant liabilities of the defendants have been created by the State of South Dakota. South Dakota has limited those rights and liabilities and made their very existence dependent on the performance of certain specific acts by a plaintiff. A procedural rule of the Federal courts cannot increase the rights of the plaintiff or the liabilities of the defendant. A contrary result, such as the one reached by the Eighth Circuit, constitutes an unconstitutional deprivation of the property of defendants.

The court in its opinion (p. 6a, n. 6) suggests that the effect of its holding is merely to extend, possibly only for a few days, the time within which defendants obtain actual knowledge of the claims against them, and that this produces a very minimal hardship. Although this may be true in a given case, it begs the issue.* Presumably there would also be a very minimal hardship on potential defendants if the South Dakota legislature had determined, instead of a three year statute of limitations, to provide a statute of limitations of three years and one month, or even four years. The point is that it has not done so. A time limit of three years to the day, and no more, was provided. Any extension of this, even for one hour, is the sole province of the South Dakota legislature and not of the Federal courts. South Dakota has created and defined the rights involved in this suit. Such rights cannot be restructured or redefined by the Eighth Circuit.

Petitioners respectfully submit that the doubts expressed by the Eighth Circuit itself more than eight years after *Hanna* justify review by this Court. Either the *Erie-Ragan-Hanna* complex of principles is to be properly applied by inferior courts, without doubtful sophistry or a new rule of application, which does not engender con-

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* The court's reasoning undercuts the very essence of a statute of limitations which affects the substantive right of a claimant as a matter of state policy. A state's bar of stale claims obviously has a salutary purpose. When exceptions are necessary because of equitable considerations, the state legislatures make suitable provisions for tolling beyond the prescribed period, as in the case of claimants who are infants or incompetents. Moreover, the extension of notice by "only a few days" may well be the determinative factor in a products liability suit against a foreign manufacturer. It is well known, of course, that after a period of time evidence vanishes, witnesses move on or die or otherwise become unavailable or their recollections fade. This difficulty is amplified in the case of an out-of-state defendant and it is too simplistic an approach to state categorically that an additional delay produces only a minimal hardship.

fusion and does not raise constitutional difficulties, must be enunciated. In either case a determination by this Court is required.

C. The Split in Authorities Dealing with these Issues Justifies Review by this Court.

The Eighth Circuit recognized the split among Federal decisions and the commentators concerning the impact of *Hanna* upon *Ragan* (p. 5a); countless law review materials comment on the issue and express various approaches. *E.g.*, Note, *The Tolling of State Statues of Limitations in Federal Courts*, 71 Colum. L. Rev. 865 (1971); Note, *A Chance for the Ragan Court To Redeem Itself: Chappell* v. *Rouch*, 26 S.W.L.J. 429 (1972); Note, *State Statutes of Limitations in Federal Courts*, 1971 Duke L.J. 785.

In light of the division on so elementary but important a question of law, it is submitted that this Court should review the decision of the Eighth Circuit.

CONCLUSION

For all of the reasons set forth, this petition for a writ of certiorari should be granted.

October 17, 1973

Respectfully submitted,

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APPENDIX

Opinion of United States Court of Appeals For the Eighth Circuit

Nos. 72-1625 and 72-1670

Paul D. Prashar and Darlene Prashar,

Appellants,

v.

Volkswagen of America, Inc., a Corporation, and Import Motors of Chicago, Inc., a Corporation,

Appellees,

Volkswagenwerk Aktiengesellschaft, a Corporation, Also Known as Volkswagenwerk, G.m.b.H.

Appellant,

v.

Paul D. Prashar and Darlene Prashar,

Appellees.

Appeals from the United States District Court for the District of South Dakota.

Submitted: April 11, 1973
Filed: June 27, 1973.

Before LAY and STEPHENSON, Circuit Judges, and TALBOT SMITH,* Senior District Judge.

* The Honorable Talbot Smith, Senior United States District Judge, Western District of Michigan, sitting by designation.

Lay, Circuit Judge.

This is a diversity of citizenship case arising in the State of South Dakota. Both appeals revolve around the same basic question—whether compliance with Rule 3 of the Federal Rules of Civil Procedure constitutes "commencement of an action" sufficient to toll the South Dakota statute of limitations. Plaintiffs brought an action to recover for personal injuries incurred on October 5, 1968, while operating a Volkswagen on a South Dakota highway. The defendants were the manufacturer, Volkswagenwerk Aktiengesellschaft; the importer, Volkswagen of America, Inc.; and the regional distributor, Import Motors of Chicago, Inc. The complaint was filed on October 4, 1971, one day prior to the running of the South Dakota statute of limitations, in the office of the clerk of the United States District Court for the District of South Dakota. However, the defendants were not personally served with process until after the applicable statute of limitations had run. Each of the defendants moved for summary judgment alleging that the period of limitations had not been tolled by the filing of the complaint in the federal district court. For under South Dakota law an action is "commenced" when either the summons is served on the defendant or the summons is delivered to the sheriff with the intent that it actually be served.[1] The district

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[1] The South Dakota Compiled Laws Ann. (1967) provide:

"15-6-3—COMMENCEMENT OF ACTION

"A civil action is commenced as provided in §§ 15-2-30 and 15-2-31. . . .

"15-2-30. Commencement of action by service of summons—Summons on codefendant.—An action is commenced as to each defendant when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him.

"15-2-31. Attempted commencement of action by delivery of summons to sheriff-Publication or service following attempt.

court acknowledged that if the action could be deemed "commenced" under the federal rules the applicable period of the statute of limitations would be tolled. However, the trial court felt bound by *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), and *Groninger* v. *Davison*, 364 F.2d 638 (8 Cir. 1966),[2] and granted summary judgment to Volkswagen of America and Import Motors. The court denied Volkswagenwerk Aktiengesellschaft's motion for summary judgment, holding that Rule 4(i)(1), Fed. R. Civ. P., governed service on the foreign corporation and since South Dakota had no comparable provision for such service, the filing of the complaint tolled the statute against this foreign corporation. In denying the motion, the district court granted a certificate pursuant to 28 U.S.C. § 1292(b) enabling Volkswagenwerk Aktiengesellschaft to appeal along with the plaintiffs.

—An attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them, usually or last resided; or if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. Such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days."

[2]In *Groninger*, an action for personal injuries was filed in the federal district court one day before Iowa's two-year statute of limitations was to expire. The defendant moved for summary judgment on the ground that the suit had not been commenced within the two-year period since Rule 49 of the Iowa Rules of Civil Procedure specifically stated that an action was deemed commenced for purposes of tolling the statutes of limitations by serving the defendant with an original notice. The district court granted the defendant's motion and this court affirmed—concluding that the case was controlled by the Supreme Court's opinion in *Ragan* v. *Merchants Transfer & Warehouse Co., supra.*

We find that Rule 3 of the Federal Rules of Civil Procedure governs both appeals and order the reinstatement of the action against all defendants.

The *Ragan* case involved a diversity suit brought to recover damages for personal injuries occurring in Kansas. The complaint was filed within the applicable Kansas statute of limitations. However, the summons was not served on the defendant until after the time period had expired. The Kansas statute of limitations provided that an action would be deemed commenced at the time the summons was served. The Supreme Court held that even though the plaintiff had complied with Rule 3 of the Federal rules, the action was nevertheless barred. The Court reasoned that:

> "Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a difference measure of the cause of action in one court than in the other and the principle of *Erie R. Co.* v. *Tompkins* is transgressed." *Ragan* v. *Merchants Transfer Co.*, 377 U.S. at 533.

Some sixteen years later in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), the Court was faced with a direct conflict between Federal Rule of Civil Procedure 4(d)(1) and a state law governing service of process. A diversity suit was timely filed in the Massachusetts federal district court. Service of process was made pursuant to Rule 4(d)(1) by leaving copies of the summons and complaint with the defendant's wife at his residence. The defendant urged that the action should be dismissed since the service of process was contrary to state law which required "in hand" delivery of the summons to the defendant. The federal district court, relying on *Ragan* and *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), granted summary judgment to the defendant. On appeal the Supreme Court

reversed. This time the Court did not apply the state law and through Chief Justice Warren wrote:

> "[I]t cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." *Hanna* v. *Plumer*, 380 U.S. at 473-474.

Some courts have taken umbrage in the *Hanna* language to believe that *Ragan* overruled.[3] Several commentators have joined in this belief.[4] Other courts, such as our own, have disagreed and under circumstances on all fours with *Ragan* have reluctantly felt compelled to apply the law of *Ragan*.[5] Undoubtedly the total demise of *Ragan* would

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[3] See, e.g., *Grabowski* v. *United States*, 294 F. Supp. 421 (D. Wyo. 1968); *Elizabethtown Trust Co.* v. *Konschak*, 267 F. Supp. 46 (E.D. Pa. 1967); *Sylvestri* v. *Warner & Swasey Co.*, 244 F. Supp. 524 (S.D.N.Y. 1965), aff'd. 398 F.2d 598 (2 Cir. 1968); cf. *Hardy* v. *Green*, 277 F. Supp. 958 (D. Mass. 1967); *Newman* v. *Freeman*, 262 F. Supp. 106 (E.D. Pa. 1966); *Callan* v. *Lillybelle, Ltd.*, 39 F.R.D. 600 (S.D.N.Y. 1966).

[4] See, e.g., 2 Moore, Federal Practice § 3.07 [4.-3-1] at 37 (1972 Supp.); Stason, *Choice of Law Within the Federal System: Erie versus Hanna*, 52 Cornell L.Q. 377, 397 (1967).

[5] In *Groninger* v. *Davison*, 364 F.2d at 642, Judge Vogel observed that "[w]hile it is difficult to reconcile *Hanna* v. *Plumer* . . . with the holding in *Ragan*, we nevertheless must conclude that the majority of the Supreme Court . . . felt that it was not an overruling of *Ragan*." See also *Sylvester* v. *Messler*, 351 F.2d 472 (6 Cir. 1965). cert. denied, 382 U.S. 1011 (1966); *Anderson* v. *Phoenix of Hartford Insurance Co.*, 320 F. Supp. 399 (W.D. La. 1970); *Decker* v. *Fox River Tractor Co.*, 309 F. Supp. 648 (E.D. Wis. 1970); *O'Shea* v. *Binswanger*, 42 F.R.D. 21 (D. Md. 1967); cf. *Anderson* v. *Papillion*, 445 F.2d 841 (5 Cir. 1971).

not sadden anyone—perhaps only because of the harshness of the rule to the individual case.[6]

However, it is not the prerogative of this court to overrule *Ragan*. And there should be little doubt as to the verity of Judge Vogel's observation in *Groninger: Hanna* did not overrule *Ragan*. The Supreme Court, although perhaps tenuously in the eyes of many, still sought to distinguish *Ragan* in *Hanna*. The Court made direct reference to the fact that *Ragan* did not involve a federal rule as broad as the state rule with which it purportedly clashed,[7] 380 U.S. at 470, and the Court additionally observed that following Rule 4(d)(1) did not involve, as it did in *Ragan*, "a situation where application of the state rule would wholly bar recovery. . . ." *Id.* at 469. Thus we reaffirm, as we did in *Groninger*, that for us to ignore *Ragan* would abdicate our trust as an inferior federal court bound by higher law. However, contrary to the defendants' urging, this does not conclude the matter.

It is recalled that *Hanna* distinguished *Ragan* on the ground that Federal Rule 3 was not broad enough to cover

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[6] There are probably many who share Mr. Justice Harlan's concurring reasoning in *Hanna:*

> "At most, application of the Federal Rule would have meant that potential Kansas tort defendants would have to defer for a few days that satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort. In such circumstances the interest of the federal system in proceeding under its own rules should have prevailed." 380 U.S. at 477.

[7] The Court, well aware of the existence of *Ragan*, noted that:

> "This Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State. . . ." *Hanna* v. *Plumer*, 380 U.S. at 472.

the particular problem involved in *Ragan*. Federal Rule 3 does not attempt to specify that filing tolls the controlling statute of limitations. On the other hand the Kansas statute in *Ragan* did specifically address itself to the manner of tolling the period of limitations.[8] The significance of this relates to our reading of *Ragan* that Rule 3 was not controlling since the Kansas commencement of action statute was so intimately bound up with the rights and obligations created by the state statute of limitations that the state law governed under *Erie* principles.

In this regard, the *Ragan* Court specifically considered the fact that under Kansas law the commencement of actions was an integral part of the statute of limitations. *Ragan supra* at 532, 534. In the instant case it is urged that the South Dakota statute on commencement of action is *not* an integral part of the statute of limitations. Although contained in the same chapter along with the statute of limitations,[9] the South Dakota statute defining when an action is commenced does not refer to the limitations

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[8] Kan. Gen. Stats. 1935, § 60-308 provided:

> "An action shall be deemed commenced within the meaning of this article [statute of limitations], as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the partly faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days."

[9] South Dakota Compiled Laws Ann. § 2-14-9 (1967) specifically provides that "[s]ource notes, cross-references, and titles whether designating entire titles, parts, chapters, sections, or subdivisions, constitute no part of any statute."

statute. We deem it significant that the South Dakota Supreme Court has held that the commencement of actions statute is a general statute. Thus in *Taylor* v. *McCarty*, 4 N.W.2d 816, 817-818 (S.D. 1942), the South Dakota Supreme Court specifically observed:

> "SDC 33.0202 [commencement of action statute] appears as part of a chapter of our Code dealing with the limitations of actions. Similar provisions have been construed by other courts as only fixing the time of commencement of the action for the purpose of applying the statute of limitations. See Wait's New York Practice Simplified, 4th Ed., Vol. 1, p. 717; *H. L. Spencer Co.* v. *Koell*, 91 Minn. 226, 97 N.W. 974. However, in the case of *Tabour Realty Co.* v. *Nelson, et al.*, 56 S.D. 405, 228 N.W. 807, the quoted statute was interpreted as a rule of general application in fixing the commencement of actions. That interpretation has been adopted by the Legislature through enactment of the South Dakota Code of 1939 (In re Gooder's Estate, S.D., 3 N.W.2d 478), and we are not at liberty to reconsider its construction."[10]

Even though one may conclude that the South Dakota commencement statute is not an integral part of that state's statute of limitations, the question remains whether this should constitute a material difference. The defendants urge that it does not since *Ragan* stressed that "where one is barred from recovery in the state court, he should likewise be barred in the federal court", 377 U.S. at 532, and consequently, it is immaterial whether or not the "commencement" provision was or was not intended to be an

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[10] That the commencement of action statute is *general* in nature and affects statutes other than limitations is further exemplified by SDCL Ann § 15-6-26(a) which states that "[a]fter commencement of the action the deposition may be taken without leave of court. . . ." See also *Tabour Realty Co.* v. *Nelson*, 228 N.W. 807 (S.D. 1930) (garnishment proceedings); *Taylor* v. *McCarty, supra.* (appointment of receiver).

integral part of the statute of limitations. Cf. 2 Moore, Federal Practice § 3.07[4.-3-1] at 779 (2d ed. 1970).

In applying *Ragan* and its analysis of *Erie* and *Guaranty Trust*, we adhere to Chief Justice Warren's admonition in *Hanna* that the "out-come determination" test cannot be read without reference to the twin-aims of *Erie*: (1) discouragement of forum shopping and (2) avoidance of inequitable administration of the laws. 380 U.S. at 468.

When Federal Rule 3 and the South Dakota commencement statute are examined as "housekeeping rules" it is obvious that we are dealing only with a *mode* of enforcing state-created rights.[11] There is little or no encroachment on state policy when we adopt one rule over the other. The *manner* in which the tolling statute operates is primarily designed to put litigants on notice that suit is being filed. As Justice Black observed in *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 467 (1962):

> "When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure."

When considered in this light there is little likelihood that the federal rule would cause a plaintiff to choose the federal court. Compare *Byrd* v. *Blue Ridge Cooperative,*

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[11] "*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules. Cf. *Herron* v. *South Pacific Co.*, 283 U.S. 91 'When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic.' *Guaranty Trust Co.* v. *York, supra,* at 108; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 555." *Hanna* v. *Plumer*, 380 U.S. at 473.

Inc., 356 U.S. 525, 536-40 (1958). Under South Dakota law, at the time of filing the complaint in federal court the limitation period was still running in the state court. (Cf. *Sylvestri* v. *Warner & Swasey Co.*, 398 F.2d 598, 606 (2 Cir. 1968). All that was necessary under state law to toll the statute would have been to deliver the summons to the sheriff in the county wherein the defendant corporations were doing business with the intent that the summons actually be served within sixty days. See SDCL Ann. § 15-2-31. Surely this additional act is not so substantial to motivate the plaintiff to choose one forum over another. As has often been said, federal diversity actions can never be identical to those carried out in state form. See *Atkins* v. *Schmutz Manufacturing Company*, 435 F.2d 527, 536 (4 Cir. 1970). However, even where the facts might favor the choice of the federal forum, pragmatism requires recognition of Mr. Justice Harlan's observation that "litigants often choose a federal forum merely to obtain what they consider the advantages of the Federal Rules of Civil Procedure or to try their cases before a supposedly more favorable judge." *Hanna* v. *Plumer*, 380 U.S. at 475. Moreover, we note that *Erie* was borne out of the equal protection problems generated in *Swift* v. *Tyson*, 41 U.S. (16 Pet) 1 (1842).[12] This constitutional concern was intrinsically coupled with the vital recognition of the necessary bridling of encroaching federalism in areas of state policy. As Mr. Justice Harlan stated, the primary concern in *Erie* was the choice of rule which "would substantially affect those primary decisions respecting human conduct

[12] The concern of *Erie* was with discrimination against citizen-defendants. *Ragan* similarly involved a citizen-defendant. Here, however, as in *Sylvestri* v. *Warner & Swasey Co.*, 398 F.2d at 606, we are dealing with non-resident defendants and it is difficult to assess any discrimination against the citizen-plaintiffs by reason of allowing the action to proceed in the federal court.

which our constitutional system leaves to state regulation." *Hanna* v. *Plumer*, 380 U.S. at 475.[13] The Supreme Court in *Byrd* v. *Blue Ridge Cooperative, Inc.*, 356 U.S. 525 (1958), lent further explication to this principle. An injured workman sued in tort in federal court and the defendant pleaded immunity because the plaintiff allegedly was a statutory employee under workmen's compensation law. The basic issue was whether the plaintiff was entitled in federal court to have the factual issue presented to a jury or following state law, tried solely to a judge. Mr. Justice Brennan observed:

> "We find nothing to suggest that this rule [that the defense immunity of a statutory employer was a matter to be decided by the court] was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity . . . and not a rule intended to be bound up with the definition of the rights and obligations of the parties." *Byrd* v. *Blue Ridge*, 356 U.S. at 536.

The defendants have not pointed to, nor have we found, any state policy expressed in South Dakota similar to that found by the court of appeals in *Merchants Transfer & Warehouse Co.* v. *Ragan*, 170 F.2d 987 (10 Cir. 1948) where the Kansas statute of limitations was construed to be integrated with the rule relating to commencement of actions. Cf. *Isaacks* v. *Jeffers*, 144 F.2d 25 (10 Cir. 1944), cert. denied, 323 U.S. 781. Consequently, application of Rule 3 to the South Dakota statute of limitations does not alter "the mode of enforcement of state-created rights in a fashion sufficiently 'substantial' to raise the sort of equal protection problems to which the *Erie* opinion alluded." *Hanna* v. *Plumer*, *supra* at 469.

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[13] Thus, even by here applying Rule 3 the federal court is still governed by the time-periods set forth in the state statute of limitations. See *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945).

We conclude that it is only when a state legislates a rule regarding the commencement of action as an integral part of the statute of limitations that a state policy making a mode of enforcing a state-created right intrinsically material to the right involved becomes clearly discernible and substantial. It is only then that *Erie* principles as set forth in *Ragan* must govern the litigation. Cf. *City Service Oil Co.* v. *Dunlap,* 308 U.S. 208, 212 (1939).[14]

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[14] Of course, the troublesome question is what difference does it make whether a state reads two rules together to reach a given result or legislates one rule which embodies the two to reach the same result. We recognize merit to Professor Moore's criticism of the approach taken here. See 2 Moore. Federal Practice § 3.07 [4-3-1] at 779 (2d ed. 1970).

Yet we think his *Erie* answer based on "outcome" too simplistic in view of *Byrd* and *Hanna.* It would have caused less consternation to all if Mr. Justice Harlan's views in *Hanna* would have been adopted by the majority, but the fact remains they were not. In *Hanna* the Court recited language of the Fifth Circuit which reads:

> "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules. This is especially true of matters which relate to the administration of legal proceedings, an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the *Erie* doctrine, even as extended in *York* and *Ragan,* was never to bottle up federal courts with "outcome-determinative" and "integral-relations" stoppers—when there are "affirmative countervailing [federal] considerations" and when there is a Congressional mandate (the Rules) supported by constitutional authority.' *Lumbermen's Mutual Casualty Co.* v. *Wright,* 322 F.2d 759, 764 (C.A. 5th Cir. 1963)." 380 U.S. at 472-473.

Thus, perhaps our approach runs counter to the "integral-relations" stoppers concern of the Fifth Circuit. However, to adopt this reasoning in the present case without further analysis would require us to say that *Hanna* overruled *Ragan,* which, as we said, we refuse to do. Nevertheless, we feel a determination must be made

Having found SDCL Ann. §§ 15-2-30 and 31 not to be so intrinsically related to the rights flowing from the state statute of limitations, we conclude that pursuant to the dictates of *Hanna* v. *Plumer, supra,* Rule 3 must control the manner of tolling the statute of limitations. In accord, *Chappell* v. *Rouch,* 448 F.2d 446 (10 Cir. 1971).

The judgment in 72-1625 is reversed and the actions are ordered reinstated; the judgment in 72-1670 is affirmed for the reasons stated herein.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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in every case as to whether the state has taken a rule of practice and substantially interwined that rule with the basic right of recovery. When this is so, the rule cannot be viewed as affecting only the mode of relief, and the "countervailing considerations" of a desired uniform practice in a federal court must yield to "the policy of uniform enforcement of state-created rights and obligations." Cf. *Byrd* v. *Blue Ridge, supra* at 537-538.

SUPREME COURT, U. S.

FILED

FEB 7 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-665

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
VOLKSWAGEN OF AMERICA, INC.,
and
IMPORT MOTORS OF CHICAGO, INC.,
Petitioners,

v.

PAUL D. PRASHAR,
and
DARLENE PRASHAR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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Table of Cases Cited

	PAGE
Groninger v. Davison, 364 F.2d 638 (8th Cir. 1966)	4
Hanna v. Plumer, 380 U.S. 460 (1965)	2-4
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)	2-4
Smith v. Peters, 482 F.2d 799 (6th Cir. 1973)	4
Sylvester v. Messler, 351 F.2d 472 (6th Cir. 1965), affirming per curiam 246 F. Supp. 1 (E.D. Mich. 1964), cert. denied, 382 U.S. 1011 (1966)	4

Table of Statutes Cited

SOUTH DAKOTA COMPILED LAWS:

Section 15-2-31 3

FEDERAL:

Federal Rules of Civil Procedure, Rule 4 2-3

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-665

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONERS

The opposing brief highlights the very point made in the petition for certiorari, *i.e.*, that the decision of the Eighth Circuit can only be supported by legal gymnastics which serve to confuse rather than enlighten. Faced with a decision which conflicts with law and logic, respondents open and close with two erroneous factual statements regarding the date of the filing of the petition and the presentation

of the constitutional arguments in the court below, apparently seeking to induce a denial of the petition on technical grounds. Sandwiched in between these misstatements is a discussion of the merits, premised, however, on a vital distortion of the actual issue involved.

Respondents' first and last points can be disposed of in one sentence. The petition is timely in that it was filed on October 17 and not on October 18, 1973, as respondents claim, and the constitutional issues which the petition presents were raised and discussed below in the Petition for Rehearing to the Eighth Circuit.*

Respondents' remaining contentions are equally without merit.

I.

Respondents' brief acknowledges, *sub silencio,* that *Hanna* v. *Plumer,* 380 U.S. 460 (1965), involved only Rule 4 of the Federal Rules of Civil Procedure and that the holding of that case relates only to the purely procedural aspects of the manner of service of process, rather than the statute of limitation issue dealt with in *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530 (1949). Apparently recognizing that *Hanna* thus left the holding of *Ragan* intact, the brief seeks to convey the false impression that the issue in this action differs from the one in *Ragan* and that, like in *Hanna,* the Eighth Circuit was merely concerned with a conflict between Federal and state rules regarding the manner of service. Although respondents' brief recites in some detail the steps taken to perfect service in this case, and concludes with the statement that service was "perfected upon each defendant" (p. 2, last sentence), the fact that no service in any manner was made on any defendant until *after* the statutory period is glossed over.

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* Point I of the Petition for Rehearing, relating to the constitutional aspects of this case, is annexed as an Appendix to this brief.

Had respondents, before the expiration of the statutory period, perfected service on petitioners in any manner provided in Rule 4 of the Federal Rules of Civil Procedure, *Hanna* v. *Plumer* would be relevant. If there had been delivery to a United States Marshal within that period respondents might have a colorable claim of attempted compliance with section 15-2-31 of the South Dakota Compiled Laws, which permits the statute of limitation to be tolled for sixty days by delivery of the summons to a sheriff or other officer within the statutory period. However, no service or attempt at service *in any manner* was made until *after* the statute of limitations had expired. *Hanna* thus has no application and this case is governed solely by the rule in *Ragan*.

II.

Respondents further attempt to support the Eighth Circuit decision below and to reconcile it with *Ragan* on the basis of the supposed difference between the Kansas statute involved in *Ragan* and the South Dakota statute involved in this case. Although both the Kansas and South Dakota statutes provide that an action is commenced by the service of a summons, respondents, noting the distinction in draftmanship between the Kansas and South Dakota statutes on which the Eighth Circuit premised its decision, conclude, without explanation or reason, that the Kansas statute is "substantive" while the South Dakota statute is "procedural." Even the strained opinion of the Eighth Circuit avoids this illogical characterization.

Both the Kansas and South Dakota statutes provide, in effect, that the very existence of an enforceable cause of action is dependent upon performance of a specified act—the service of a summons. The manner in which that service is to be performed may very well be a matter of procedure in which the rules applicable to Federal and state

actions vary. But no Federal procedural rule can be used to render a nullity the state statutory requirement that an act of service take place by a specified date. Where, as here, there has been no performance of the act in any manner prior to the expiration of the statutory period, the outcome is one of substance. Any other conclusion results in the perpetuation, through a Federal procedural rule, of rights and duties which have been extinguished under state law.

III.

Another recent case, *Smith* v. *Peters,* 482 F.2d 799 (6th Cir. 1973), in which a petition for certiorari is pending at present before this Court (No. 73-859), involves an attempt by the Sixth Circuit, in a more complex setting, to reconcile the decisions of this Court in *Ragan* and *Hanna.* It should be noted that, as the Eighth Circuit in this case was required to struggle with and distinguish its prior decision in *Groninger* v. *Davison,* 364 F.2d 638 (1966), so the Sixth Circuit in *Smith* v. *Peters* was required to reassess the position it took only a few years earlier in *Sylvester* v. *Messler,* 351 F.2d 472 (1965), *affirming per curiam* 246 F. Supp. 1 (E.D. Mich. 1964), *cert. denied,* 382 U.S. 1011 (1966).

Attempts to reconcile *Ragan* and *Hanna* have thus not only resulted in conflicting decisions among the Circuits, but they have in effect created basically inconsistent *intra*-Circuit decisions in at least two instances. We submit that, for this reason alone, certiorari should be granted, so that this Court may lay to rest the present confusion on a basic principle of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 5, 1974

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 72-1625 and 72-1670

PAUL D. PRASHAR and DARLENE PRASHAR,
Appellants,

v.

VOLKSWAGEN OF AMERICA, INC., a Corporation, and IMPORT MOTORS OF CHICAGO, INC., a Corporation,
Appellees,

VOLKSWAGENWERK AKTIENGESELLSCHAFT, a Corporation, also known as Volkswagenwerk, G.m.b.H.,
Appellant,

v.

PAUL D. PRASHAR and DARLENE PRASHAR,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION
Honorable FRED J. NICHOL, *Trial Judge*

PETITION FOR REHEARING

• • •

The appellant Volkswagenwerk Aktiengesellschaft, and the appellees Volkswagen of America, Inc. and Import Motors of Chicago, Inc., feeling aggrieved by the opinion of the Court of Appeals filed June 27, 1973, do hereby respectfully petition the Court for a rehearing of said case, and in support thereof submit the following:

Appendix

POINT I

THE RESULT REACHED IN THE COURT'S OPINION CONSTITUTES AN UNCONSTITUTIONAL DEPRIVATION OF THE PROPERTY OF THE DEFENDANTS.

The June 27, 1973 opinion of the Court at Page 6 recognizes, and is indeed premised on the proposition, that *Ragan* v. *Merchants Transfer & Warehouse Co.* (1949), 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520, was not overruled by *Hanna* v. *Plummer* (1965), 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8. It further declares that "it is not the prerogative of this Court to overrule *Ragan*". Yet, we submit, this is exactly what the Court has done.

We respectfully urge that re-argument of this appeal before the Court *en banc* be granted and that on re-argument the Court follow the holding of the Supreme Court in *Ragan* and its own decision in *Groninger* v. *Davison* (C.A. 8—1966), 364 Fed.2d 638. The stylistic preference in draftsmanship of a particular legislature should not be the basis for overturning established law and creating confusion, especially where it results in a decision of doubtful constitutionality. The rejection by this Court of the analysis by Professor Moore (p. 11, Note 14), which was approved in *Groninger* (364 Fed.2d at 638) is unwarranted.

When all is said and done, the holding which is distilled from *Ragan* and *Hanna*, and which still is the law, is that where the state has included as an integral part of the causes of action which it has created a requirement that the proposed defendant be formally advised of the charges against him within a specified period of time, through personal service or essentially the same kind of procedure, the rights of the claimant cannot be enlarged by ex parte procedures in the Federal Court, i.e., the simple filing of a Complaint. Any holding to the contrary would, we submit, be unconstitutional.

The substantive rights of the plaintiffs in this case and the concomitant liabilities of the defendants have been created by the State of South Dakota. South Dakota has limited those rights and liabilities and made their very existence dependent upon the performance of a certain specific act by the plaintiffs. A procedural ruling of the Federal Court cannot increase the right of the plaintiffs or the liabilities of the defendants. A contrary result, such as the one reached by the Court in its June 27, 1973 decision, constitutes an unconstitutional deprivation of the property of the defendants.

The Court in its opinion (at page 6) indicates that the effect of its holding is merely to extend, possibly only for a few days, the time within which the defendants obtain actual knowledge of the claims against them and that this produces a very minimal hardship. However, although this may be true, it does not resolve the situation. Presumably there would be a very minimal hardship on potential defendants if the South Dakota Legislature had determined instead of a 3-year statute of limitations to provide a statute of limitations of three years and one month, or even four years. The point is that it has not done so.

A time limit of three years to the day, and no more, was provided. Any extension of this, even for one hour, is the sole province of the South Dakota Legislature and not of the Federal Courts. South Dakota has created and defined the rights involved in this suit. Such rights cannot be restructured or redefined by this Court.

* * *